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### Recent EPA Ruling May Increase Brownfield Financing

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## RECENT EPA RULING MAY INCREASE BROWNFIELD FINANCING

by Mark Wilson\*

Job growth, increased tax revenue, and urban renewal are just a few of the benefits municipalities receive by redeveloping abandoned “brownfields.” Brownfields are “property, the expansion, redevelopment, or reuse of which may be complicated by the presence ... of a hazardous substance, pollutant, or contaminant.”<sup>1</sup> Yet, while the benefits for municipalities are numerous, liability concerns among private investors make it difficult for potential developers to finance such cleanup projects. Fortunately, a recent ruling by the U.S. Environmental Protection Agency’s Environmental Appeals Board (“EAB”) may relieve some lender’s concerns.<sup>2</sup>

Although clean-up costs are the responsibility of current or past owners, rather than prospective developers, the potential tort liability to residents and owners of nearby brownfields property are a major deterrent for private investors.<sup>3</sup> Under the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”),<sup>4</sup> commonly known as “Superfund,” strict, joint, and several liability for past contamination is imposed on all parties within the “chain of title” from the onset of contamination.<sup>5</sup> For instance, in *Interfaith Community Organization v. Honeywell International, Inc.*, Honeywell, a recent successor of a brownfield site, was held liable under CERCLA for damages resulting from the prior owners’ contamination that affected surrounding property owners.<sup>6</sup> Moreover, in *United States v. Fleet Factors Corp.*, the Eleventh Circuit held that a “secured creditor may incur CERCLA liability... by participating in the financial management of a facility ... indicating a capacity to influence the treatment of hazardous waste.”<sup>7</sup> Because investors can be held liable under CERCLA for damages incurred as a result of prior contamination that emanated to other properties, they hesitate to invest in brownfield redevelopments.<sup>8</sup>

While cases such as *Fleet* and *Interfaith* are rare, the perception of lender liability, especially third-party tort claims, is high among financial institutions.<sup>9</sup> The American International Group, Inc. (“AIG”) testified before Congress that “third party liability for property damage and bodily injury due to pollution issues, go to the heart of what concerns many would-be Brownfield redevelopers.”<sup>10</sup>

However, on October 28, 2005, the EAB denied Grand Pier Center, LLC, a Chicago redeveloper, reimbursement from the EPA for \$200,000 the company incurred by cleaning up an off-site sidewalk area.<sup>11</sup> Grand Pier argued that they were solely responsible for costs incurred cleaning up contamination on the property they owned, but they were not responsible for the clean-up cost of the public sidewalk.<sup>12</sup> The EAB held instead that the “facility” encompasses all areas where the contamination occurred, including Grand Pier Center’s property and the adjacent off-site sidewalk area.<sup>13</sup> The Grand Pier ruling clarifies that developers will be expected to address *all* contamination associated with a brownfield, including adjacent properties and right-of-ways.<sup>14</sup>

While it may appear this ruling makes developers more vulnerable, in reality it alleviates some investors’ concerns over third-party liability, because lenders can be assured there will be no lingering contamination. Eliminating concerns over third-party liability from lingering contamination will strengthen investor confidence; thus, brownfield redevelopment can continue to revitalize communities and provide sustainable economic growth.



ENDNOTES: **Brownfield Financing** Continued on page 81

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## ENDNOTES: BROWNFIELD FINANCING *Continued from page 41*

<sup>1</sup> Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”), 42 U.S.C. 9601 §101 (1980) as amended by Public Law 107-118 (H.R. 2869) - Small Business Liability Relief and Brownfields Revitalization Act, signed into law January 11, 2002.

<sup>2</sup> *In re Grand Pier Center, LLC*, PSD Appeal No. 04-01 (EAB, Oct. 28, 2005), 12 E.A.D. 29.

<sup>3</sup> *The State of America’s Brownfields: Hearing on What Can Be Done to Spur Redevelopment at America’s Brownfield Sites? Before the Subcommittee on Federalism and the Census, Committee on Government Reform, U.S. House of Representatives* (2005) (statement of John B. Stephenson, GAO, Director, Natural Resources and Environment) [hereinafter Hearing].

<sup>4</sup> CERCLA, *supra* note 1, at SS. 9601-9675.

<sup>5</sup> CERCLA, *supra* note 1, at §9607(a) .

<sup>6</sup> *Interfaith Community Organization vs. Honeywell International, Inc.*,

2003 U.S Dist. LEXIS 8898, 191-195 (2003).

<sup>7</sup> *United States v. Fleet Factors Corp.*, 901 F.2d 1550, 1558 (11th Cir. 1990).

<sup>8</sup> U.S. GOV. ACCOUNTABILITY OFFICE, *Stakeholders Report That EPA’s Program Helps to Redevelop Sites, but Additional Measures Could Complement Agency Efforts*, 10 (GAO-05-94).

<sup>9</sup> *Stakeholders Report, id.*

<sup>10</sup> Hearing, *supra* note 4 (from the statement of Kevin L. Matthews, Director of Governmental Relations for the American International Group, Inc.)

<sup>11</sup> *In re Grand Pier Center, LLC*, 12 E.A.D at 3-17.

<sup>12</sup> *In re Grand Pier Center, id.*

<sup>13</sup> *In re Grand Pier Center, id.*

<sup>14</sup> *In re Grand Pier Center, id.*

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